UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

KUMHO TIRES GEORGIA,	)	
	)	
Respondent/Employer	)	
	)	
and	)	**Case 10-CA-208255**
	)	**Case 10-CA-208414**
UNITED STEEL, PAPER & FORESTRY	)	
RUBBER, MANUFACTURING, ENERGY	)	
ALLIED INDUSTRIAL & SERVICE	)	
WORKERS INTERNATIONAL UNION	)	
AFL-CIO, CLC	)	
Charging Party/Petitioner	)	
	)	
	)	
	)	

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS

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COMES NOW KUMHO TIRES GEORGIA ("Company"), by and through the undersigned counsel, and files this Reply Brief in Support of Exceptions as follows:

I. STATEMENT OF THE CASE

A hearing was held from March 18 to March 22, 2019 before Administrative Law Judge Arthur J. Amchan.[1] On May 14, 2019, the Administrative Law Judge ("ALJ") issued a Decision. The ALJ found multiple unfair labor practices and that certain objections had merit and warranted a new election and remedial order. Respondent filed Exceptions to the ALJ Decision.

On July 19, 2019, after Board and Company resources were expended, the Charging Party ("Union") filed a request to withdraw the petition in Case 10-RC-20638 at the heart of allegations and the objections that had been before the ALJ. On July 25, 2019, the General Counsel filed a motion to sever the already heard the "R case" from the unfair labor practice cases. On July 29, 2019, the Company filed a Motion to Correct the Record to clarify that it consented to the severance only if the findings in this case were not a part of any record in any future "R case" involving the parties for the same unit. The motion to sever was granted on August 5, 2019.

II. ARGUMENT IN RESPONSE TO ANSWERING BRIEFS

A. Contrary to the Opposing Parties' Arguments, the ALJ Demonstrated Bias Prejudicial to Respondent That Requires a New Hearing on All Issues

The General Counsel and the Union contend that the ALJ's credibility determinations should be sustained and that the ALJ showed no bias. But the ALJ on nearly all credibility determinations found that "employee" and "former employee" witnesses for the General Counsel were credible witnesses essentially only because they were current or former "employees."

[1] Citation to exhibits offered by the General Counsel are designated with the abbreviation "GCX-", exhibits offered by the Union/Charging Party/Petitioner with "UX-.", and exhibits offered by the Respondent/Employer with "EX-." Citations to the hearing transcript are designated with the abbreviation T.___ followed by the page or pages where the authority may be found.

Conversely, the ALJ routinely determined that Respondent's witnesses were not as credible with no stated reason or because they, in his view, did not "sufficiently" address the employee testimony.

The ALJ stated his bias expressly and the bias tainted essentially all findings and conclusions. As a foundation to all the credibility determinations, the ALJ evidenced his bias against the Company and its witnesses in stating in the Decision at page 13; **"[T]he testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests**." (Emphasis added). (JD 13:39-41). He cited *Flexsteel Industries*, 316 NLRB 745 (1995); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); and *Georgia Rug Mill*, 131 NLRB 1304, 1305 n. 2 (1961), as support for his statement. The statement demonstrates ALJ bias that requires a new hearing on all issues for the following reasons:

1. There is no evidence of record that any of the witnesses was testifying against his/her pecuniary interests;

2. The ALJ statement assumes with no record evidence whatsoever that the Company is malevolent and might or would take adverse action against any of the employee witnesses for testifying;

3. All witnesses are entitled to equal assessment of their reliability until evidence of record either diminishes or boosts the assessment of reliability;

4. The statement is irrational and unreasonable, and is not based on evidence of record or reasonable inference there from, and prejudicially favors only the opposing parties.[2]

[2] On its face, the statement the ALJ makes as the foundation of his overarching credibility decision is erroneous. It is not true! It is an unreasonable and irrational statement to apply in all circumstances and certainly is false in numerous circumstances. For example, current employee witnesses may, in fact, be testifying in their pecuniary interests or their perceived pecuniary interests (for example, when employees are testifying to seek back pay for an allegedly unlawful suspension or as here, when they perceive a union, if voted in, will get the employee witness better wages, benefits and/or other terms and conditions of employment). In fact, all other things being equal, most

Here, there was no evidence that any witness testified adversely to their pecuniary interests – NONE. Each employee testified in a way he or she desired. Each has full protections of the Act, the Board, and courts against any pecuniary loss, and it is wholly prejudicial and improper, with no evidence, to make assume as did the ALJ that the Company is malevolent and would retaliate.

Indeed, here, to the extent there was any evidence at all of pecuniary interest, it showed that the employees believed that having the Union was in their pecuniary interest, and a goal of this proceeding by the Union was a new election to try to get the Union in. (See Tr. pp.24:9-16; 219:5-11; 220:1-7). Conversely, there is no evidence whatsoever that any employee feared retribution form the Company for testifying –NONE. Thus, the bottom line is that here we have an ALJ making a reliability determination adverse to the Company and in favor of the opposing parties on the expressly stated basis of complete assumptions and suppositions that are solely the product of his bias and not evidence – indeed, here, with no supporting evidence whatsoever.

If the quoted statement above relied upon by the ALJ and the opposing parties is suggested as a controlling standard of law under the Act, the current Board should reject that standard as irrational, unreasonable, and unfair, and instead adopt the standard that **all witnesses for any party in a Board proceeding are entitled, as a matter of fundamental fairness, to an equal presumption of reliability until evidence of record demonstrates a basis for the reliability to be questioned or determined**. If necessary, the Board decisions that the ALJ and the opposing parties purport to rely on, and any others tilting the proceeding by unfairly making the same prejudicial assumptions and suppositions about employee witnesses without any supporting evidence, should be overruled. Enough is enough. As necessary, the Board should sweep this and

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employee witnesses not compelled by subpoena to testify may be testifying in support of their pecuniary interests or their perception of those interests. Here, the ALJ had no basis to make the carte blanche statement that was a product of and vividly demonstrates his impermissible bias against the Company and its witnesses "out of the blocks" in his consideration of the cases.

any other vestiges of pro-General Counsel and pro-Union bias away in favor of fundamental fairness to all parties and equal treatment of witnesses under the Act.

B. The ALJ's Statement That the Voter List Was "Completely Inaccurate" Also Demonstrates the ALJ's Bias Against the Company

The General Counsel does not address the substance of the voter list issue in its answering brief because the Union filed a request to withdraw its petition. The Union addresses the voter list issue, but largely ignores the ALJ's conclusion that the voter list was "completely inaccurate."

The ALJ found that the voter list was "completely inaccurate." (JD 20:2-29). The ALJ failed to provide any explanation of how he came to that conclusion. Overwhelming and wholly uncontroverted evidence showed that the list was NOT "completely inaccurate;" the Union knows that, yet it dissembles and distracts, to support ALJ's biased decision as a whole.

The Company submits that the ALJ's glaringly erroneous conclusion further demonstrates the ALJ's prejudicial bias. He went out of his way with hyperbole and was conspicuously "over-zealous" in his attack on the Company. There is no other plausible explanation for that statement -- that the voter list was "completely inaccurate" – when it was clearly not and the ALJ knew it. Who would make such a statement as that when it was demonstrably not true other than someone with a prejudicial bias against the Company! The hyperbole the ALJ employed further demonstrates clear prejudical bias by the ALJ that warrants a new hearing.

C. The Opposing Parties Argue in Support of the ALJ Decision, Ignoring the Surrounding Context of the Statements Alleged to be Unlawful, when the Context Demonstrates that the Statements were Lawful Statements of Views, Argument, Opinion or Application of Law that Were Not Threats of Reprisal to be Taken Solely of the Company's Own Volition

The opposing parties in their briefs, as did the ALJ, pluck statements out of the context and at every turn construe every Company statement of any negative consequences of union support or vote as an unlawful threat of reprisal for the union support or vote. But not all statements of

negative consequences of union support or vote are unlawful threats of reprisal, as *Gissel* and its progeny construing it correctly make clear. Here, none of the statements were threats at all, much less threats of reprisal for union support or vote. Instead, each of the statements, when considered in context of the statements and other information known to the employees surrounding the statement, was one of two types of lawful statements under *Gissel* and its progeny:

(1) a statement of views, arguments, or opinion of the possible consequences of union support or vote on both (1) the Company and (2) its managers, supervisors, and employees that are not solely of the Company's volition but instead are caused by a third party action; or

(2) a statement of views, argument, or opinion on application of the law of labor relations under the Act.

These types of statements are lawful debate under Section 8 (c) of the Act. *See Hendrickson USA, LLC v. NLRB,* ___ F.3d ___, 2019 WL 3492162 slip op. at 6-11 (6th Cir. August 1, 2019).

None of the alleged or credibly proven statements were threats of reprisal to be taken solely of the Company's own volition. All were statements of the Company's belief of possible consequences that were not solely of its own volition or statements of legal realities of collective bargaining under the Act. However, the ALJ was prejudicially intent on finding a threat in each the statements about economic and legal realities of the situation facing the Company and the employees. Gissel makes clear is that **only threats of economic reprisal for unionization taken solely on Respondent's own volition are unlawful.** Respondent could freely speak of the possible economic consequences of actions that "would, could, or might" be caused by events set into motion by third parties such as the corporate creditors who were applying pressure that the Company told all the employees about or customers choice in reaction to unionization. See NLRB v. Gissel Packing Co., 395 U.S. at 619; Miller Industries Towing Equipment, Inc., 342 NLRB

1074, 1076 ("apt description of the likely effects of interrupted production" is lawful); Action Mining, Inc., 318 NLRB 652, 656-57 (1995) (statement of negative economic conditions facing employer and possibility of losing customers because of strike is lawful because no suggestion of company taking retaliatory action solely of own initiative); see also, General Elec. Co. v. NLRB, 117 F. 3d 627, 632-33 (D.C. Cir. 1997) (predictions about economic consequences beyond employer control are lawful).

Here, from the inception of the campaign, the Company was vocal and told ALL employees about its poor financial condition and the risk to the Company's survival imposed by its creditors' power over the Company due to the poor financial condition and the risk of customer reactions. Employees knew that though all conversations. **There was never any threat to the Company's survival or jobs emanating directly from retribution or reprisal solely of the Company's own volition that was communicated to employees - NONE.** The Company, instead, informed all employees of adverse consequences threatening the Company's survival and jobs that emanated from the risk that actions by the creditors due to financial condition and customer choice could, might or would force or cause action.[3]

[3] President Hyunho Kim testified that he told employees that the Company was not financially doing well. (Tr. p.536:6-12).[3] In describing the financial status of the Company, Kim told employees that since the plant was at the beginning stage, Kumho was losing money. He also testified that he said if the losses continued, everyone, including himself, could lose their jobs and "we can be in serious issue." (Tr. p.536:6-17). Employees were also informed and aware of Kumho's financial status that could have affected the future of the plant from an outside source. It is undisputed that the bank (**a creditor**) took over financial control of Kumho about a week or two before the election. (Tr. p.352:13-18). The Company's financial condition was widely publicized by The Korea Herald article that was published on September 27, 2017, in the middle of the critical period before the election. (Tr. P.426:10-15). The excerpt from The Korea Herald article which was shared with all employees during a collective bargaining education class stated, "In the process of restructuring, all the concerned parties – creditors, workers at the tire maker and subcontractors – badly need to 'share the burden deriving from the painful debt-rescheduling program." (EXs. 7 and 8).

Against the backdrop of the Company's poor financial performance and financial pressure and control by creditors that was made known to all employees, many of the statements that the ALJ found to be unlawful are precisely the type of lawful communications to voters of what might be the consequences of the labor situation. None of the statements could reasonably be interpreted as threatening any sort of reprisal "**solely" of the Respondents "own volition**." All of the statements were about "surviving" threatened actions by third parties or application of the Act. Thus, under Gissel and current Board progeny correctly applying the law of that decision, the ALJ's findings should be set aside.

A representative example of the level of obfuscation of both the English language and the law that the General Counsel and the Union stoop to in order to buttress the ALJ's decision, is their argument that a statement in a Company speech that bargaining "**can** start from scratch" is unlawful. The General Counsel, the Union, and the ALJ devote line upon line, and citation upon citation, to the proposition that an employer's statement that bargaining "**will** start from scratch" or "**would** start from scratch" is *per se* an unlawful threat of reprisal. But not only is that not the law, see *See Hendrickson USA, LLC v. NLRB, supra,*, that is not what the Company speaker said; he said "**can**" That word connotes possibility, not prediction. It is a lawful statement of the law; bargaining "**can**" start at scratch and the Company is allowed to make that fact – objective application of law under the Act – known to employees. Moreover, there is not one scintilla of suggestion or reasonable inference from the word "**can**" that the word really meant "**will**" or "**would.**" The word used was "**can**." It did not suggest futility. It is lawful. *See, e.g., Hendrickson USA, LLC, supra, slip op.* 7.

The above is but one example of the sophistry and artifice Respondent is forced to deal with here due to the bias of the ALJ and the unreasonable arguments of the General Counsel and

the Union that take lawful statements and convert them into threats by means of taking the statements out of context. Throughout the ALJ's decision and the answering briefs, the neglect of the facts and an employer's right of free speech is typical and the rule rather than the exception. The legal bases for the statements alleged to be unlawful are listed below:

1. **Kim's conversation with Landon Bradley – Exceptions 1, 2, 5, and 27** – lawful statement of creditor driven-cause.

2. **Kim's Conversation with Mario Smith – Exceptions 5 and 28** – lawful statement of creditor driven-cause.

3. **Miller's statement that, "Five percent of productivity can just quickly go away and be captured by someone else." – Exceptions 4 and 29** – lawful statement of creditor driven-cause.

4. **Miller's statement that, "We cannot just have this place shut down because we did not decide to get together and work together." – Exceptions 4 and 30** – lawful statement of creditor driven-cause.

5. **Miller's statement that, "I have to sit across the table, not because I really want to, but the NLRB's laws and regulations requires that . . . ."– Exceptions 4 and 31** – lawful statement of application of the Act.

6. **Miller's statement that, "We all could be adversely impacted if the business closes down or if the tires are shipped or there's a disruption in the production and you sit idly by . . . ." – Exceptions 4 and 32** – lawful statement of customer- and/or creditor-driven cause.

7. **Miller's statement that, "If they strike, you can see the molds and tires being produced somewhere else. It's that five percent, and that's why we have to put a number around it. It can be produced somewhere else." – Exceptions 4 and 33** – lawful statement of customer- and/or creditor-driven cause.

8. **Miller's statement that, "It's only taken me a couple of weeks to determine that bad things could happen, that worse things could happen." – Exceptions 4 and 34** – lawful statement of customer- and/or creditor-driven cause.

9. **Miller's statement that, "And we'll all be looking at tires being shipped somewhere else. So I'm telling you now, okay?" – Exceptions 4 and 35** --lawful statement of customer- and/or creditor-driven cause.

10. **Miller's statement that, "But he said, everything's at risk. He said, you know what? We I [sic] get paid well in our currently. Very good. We overlook that sometimes." –**

Exceptions 4 and 36 -- lawful statement of customer- and/or creditor-driven cause and application of the Act.

11. Miller's statement that, "Collective bargaining; we can start from scratch." – Exceptions 4 and 37 – lawful statement of application of the Act.

D. The Exceptions Regarding Other Alleged Threats of Plant Shutdown or Loss of Employment Have Merit

The ALJ, consistent with his expressed bias in favor of the General Counsel's employee witnesses and against Respondent's witnesses, took multiple supervisors' statements and/or conversations out of context and used unreasonable interpretations to find the statements to be threats. But none were statements threatening reprisal solely of the Company's volition.

1. Harry "Kip" Smith's alleged comments that in the event of a strike there would be a possibility of molds sent to Korea – Exception 38 -- lawful statement of customer- and/or creditor-driven cause.

2. Michael Geer's alleged comment that unionization would result in Respondent losing contracts – Exception 39 -- lawful statement of customer and creditor--driven cause.

3. Kip Smith's alleged statements made in conjunction with showing of pictures of carnival workers to the effect that he had found employees another job -- Exception 40 -- lawful -- statement of customer- and/or creditor-driven cause.

4. Brad Asbell, Chris Wilson, and Eric Banks' alleged statements predicting plant shutdown and/or loss of benefits – Exception 41 -- lawful statement of customer- and/or creditor-driven cause.

5. Freddie Holmes' alleged comment to Jemel Webb that Respondent would lose contracts with Kia and Hyundai because those companies do not do business with unionized suppliers—Exception 42 -- lawful statement of customer-driven cause.

6. Stevon Graham's alleged comments to Annie Scott and Christopher Harris that Respondent would lose contracts with Kia and Hyundai because those companies do not do business with unionized suppliers—Exception 43 -- lawful statement of customer-driven cause.

7. Michael Walker's alleged comment to Randy Wilson that unionization would result in plant shutdown —Exception 44 -- lawful statement of customer- and/or creditor-driven cause.

8. Chris Butler's alleged statements to Marcus Horne to the effect that if the Union comes in, Respondent may leave and go to South Korea – Exception 45 -- lawful statement of creditor-driven cause.

9. Alleged statement by Michael Whiddon at pre-shift meeting to the effect that if we get the Union in, it's possible that we could go on strike, and we could lose our jobs – Exception 46 -- lawful statement of customer- and/or creditor-driven cause.

E. The Exceptions Regarding Findings of Unlawful Interrogations Have Merit. – Exceptions 6, 7, 8, 9, 10, 13, 21, 47, 48, 49, 50, 55, and 63-66.

The Company stands with the arguments in its opening brief.

F. The Exceptions to Findings of Other Alleged Interference Have Merit – Exceptions 11, 12, 14, 26, 51-54, 56-58 and 63-66.

The Company stands with the arguments in its opening brief.

III. CONCLUSION

For the reasons set forth herein and in the accompanying Exceptions and supporting Brief, no remedy ordered by the ALJ is warranted here. The Respondent requests that the ALJ's Decision and remedial order not be adopted as the Board's Decision and Order and that the Amended Complaint be dismissed.

Respectfully submitted, this 16th day of August, 2019.

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This is to certify that I have electronically filed the above **Respondent's Reply Brief in Support of Exceptions** with the National Labor Relations Board's e-filing service. I have also emailed a copy to the parties listed below:

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Dated this 16th day of August, 2019.

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